

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ). In addition, the parties stipulated at oral argument to the Board that the 12 percent whole body impairment determined by the ALJ in the Award is appropriate. Therefore, the issue of claimant's functional impairment is no longer before the Board for its determination. The Board, therefore, adopts the finding by the ALJ that claimant suffered a 12 percent whole body functional impairment for the injuries suffered on April 2, 2002.

ISSUES

1. What is the nature and extent of injury? In particular, what is claimant's task loss and wage loss under K.S.A. 44-510e?
2. Should claimant be precluded from receiving a work disability under K.S.A. 44-510e? In particular, does claimant's termination by respondent for excessive absences establish a lack of good faith on claimant's part?
3. Did claimant make a good faith effort to find appropriate employment after her termination by respondent? If so, what post-injury wage should be imputed to claimant?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant was hired by respondent in February 2002 as a back up machine operator. This job required that claimant use her hands in a repetitive fashion. By April 2002, claimant began experiencing pain and numbness in both hands and awakening during the night. Claimant advised her supervisor about the problems and was referred for medical treatment to Kenneth A. Fischer, M.D. On August 26, 2002, Dr. Fischer performed an open carpal tunnel release on claimant's left wrist.

On July 10, 2002, claimant was referred by claimant's attorney to Sergio Delgado, M.D., a board certified orthopedic surgeon. Dr. Delgado acknowledged claimant had left carpal tunnel syndrome, which was diagnosed objectively by EMG, and he also suspected right carpal tunnel syndrome, as claimant's complaints were similar to those on the left. Dr. Delgado further stated there was evidence of extensor tendinitis at the level of the wrist, particularly on the right but also present on the left. Dr. Delgado recommended that claimant return to work with restrictive use of her upper extremities, limiting the repetitive use of her hands as much as possible.

Claimant continued working for respondent until May 23, 2003, at which time she was terminated for excessive absences. Both claimant and respondent's human resource representative, Dally Sierra, testified regarding the events leading up to claimant's termination. Claimant and Ms. Sierra acknowledged that several of claimant's absences were related to claimant's hand and upper extremity difficulties. Respondent's policy was that if an employee missed work as a result of work-related injuries, the employee's absence would be excused if a medical off-work authorization was provided. For the

incidents which led up to claimant's termination,¹ no medical authorization was provided by claimant. Claimant acknowledged this. But, it is noted that claimant's treatment with Dr. Fischer ended in 2002. At the time of claimant's termination, there did not appear to be an authorized treating physician.

Additionally, claimant testified that after her return to work by Dr. Fischer, claimant was to be on modified duty, but respondent regularly had claimant performing her regular duties. While the plant nurse told claimant she could take her time and work at her own pace, claimant's supervisor told her that she had to do more. Claimant testified that these additional duties exceeded her restrictions and caused her significant hand problems. Claimant testified that on several occasions, she went to the plant nurse and showed the nurse that her hands were swollen and causing her difficulties. Claimant was instructed by the nurse not to do the work which was causing the problem. However, at the same time, claimant was being advised by her supervisor to do the work.

After leaving respondent's employment in May of 2003, claimant received unemployment benefits for a time and then found a custodial job at W. Harris Government Services, working between 25 and 29 hours a week. In 2004, claimant worked on several different jobs, at times working full-time at one job and part-time at another job and, at other times, working part-time at more than one job. The records placed into evidence indicate claimant made a total of \$25,345 in income for the year 2004. Part of the time, claimant was working for Lesco, which is a contract food service for Fort Riley. Claimant continued working for Lesco into 2005, but was laid off on March 5, 2005, because the building in which she was working was closed. Claimant was, however, by contract, subject to recall and was allegedly advised by the unemployment office that she need not seek other employment because she would be called back to work. Claimant said she was advised by the unemployment office that she was qualified to receive unemployment benefits during the time she was laid off from Lesco due to the fact she was contractually eligible for a recall. Thus, at the time of the regular hearing on May 26, 2005, claimant was laid off from Lesco, collecting unemployment benefits at the rate of \$284 per week and not looking for work.

Claimant was referred to John B. Moore, IV, M.D., board certified plastic and hand surgeon, with the first examination on June 3, 2003. Dr. Moore also diagnosed bilateral carpal tunnel syndrome and noted that claimant was post carpal tunnel release on her left wrist. Dr. Moore found claimant's symptoms to be the result of her overuse and repetitive work activities. On November 5, 2003, Dr. Moore performed a carpal tunnel release on claimant's right wrist. Dr. Moore assessed claimant a 10 percent impairment to each upper extremity pursuant to the fourth edition of the *AMA Guides*.²

¹ Sierra Depo., Ex. 1.

² American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Claimant returned to Dr. Delgado on June 29, 2004, for a follow-up examination. At that time, Dr. Delgado noted claimant had continued to have mild carpal tunnel symptoms, including numbness, tingling and pain with the use of her upper extremities. Dr. Delgado also assessed claimant a 10 percent functional impairment to each upper extremity, which equates to a 6 percent whole person impairment, which, when combined, results in a 12 percent whole person impairment pursuant to the fourth edition of the *AMA Guides*.³

Respondent argues that claimant should be denied work disability under K.S.A. 44-510e in excess of her 12 percent whole body functional impairment due to the fact that she was terminated from her employment for excessive attendance problems. Termination for cause does not always result in a denial of work disability. The test is good faith on the part of both the employer and the employee.⁴ In this instance, claimant's termination was the direct result of attendance problems which were, at least in part, associated with claimant's upper extremity difficulties. While respondent argues that all claimant had to do was obtain medical authorization to be gone on the days when claimant's hands were bothering her, the Board finds it significant that, at the time claimant was having many of these difficulties, she did not have an authorized treating doctor. Dr. Fischer had ceased providing claimant with medical care, and claimant's trips to the nurse resulted in no additional medical treatment being authorized. It is also significant that, on several occasions, claimant went to the nurse, showing the nurse her swollen hands. When claimant was advised to restrict her work activities, claimant was precluded from doing this due to the instructions of her immediate supervisor.

Claimant argues she did not act in bad faith when terminated because of her upper extremity difficulties, because these difficulties were, in part, created by a lack of medical care and, in part, created by a lack of respondent's willingness to observe the restrictions under which claimant was returned to work after her carpal tunnel surgery with Dr. Fischer. The ALJ found that claimant's activities leading up to her termination of employment did not constitute bad faith on claimant's part and that claimant was eligible, under K.S.A. 44-510e, for a permanent partial general disability. The Board agrees that claimant made a good faith effort to perform her job duties with respondent.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.⁵ As noted above, the parties have stipulated to claimant's permanent partial impairment of function, and

³ *AMA Guides* (4th ed.).

⁴ See *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

⁵ K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

that 12 percent whole body impairment is adopted by the Board for the purposes of this award.

K.S.A. 44-510e defines permanent partial general disability as,

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.⁶

Both Dr. Moore and Dr. Delgado were questioned regarding what, if any, task loss claimant may have suffered. Dr. Moore felt that claimant, as a result of her surgeries, was significantly healed, that she required no restrictions and suffered no loss of ability to perform any of the tasks she had performed in the 15 years prior to her injury. Dr. Delgado, after reviewing the task list of Monty Longacre, claimant's vocational rehabilitation expert, found that claimant had lost the ability to perform twenty-one of the thirty-six tasks on the list. However, as noted by the ALJ, Dr. Delgado's testimony regarding two of those tasks (specifically numbers 6 and 34) was less than specific and the doctor vacillated as to claimant's ability to perform those tasks. The ALJ determined that claimant had, therefore, lost the ability to perform nineteen of the thirty-six tasks, which the ALJ determined was a 47.2 percent loss. The parties stipulated at oral argument that nineteen of thirty-six tasks lost equates to a 52.8 percent task loss percentage. This mathematical error will be corrected at the time of the final computation of this award, if appropriate.

In considering what, if any, task loss claimant suffered as a result of her injuries for respondent on April 2, 2002, the Board will consider the opinions of both Dr. Moore and Dr. Delgado. The Board, however, is unpersuaded by the opinion of Dr. Moore that claimant could undergo bilateral carpal tunnel surgeries with residual symptoms of swelling and weakness, which the doctor considered to be common following carpal tunnel surgery, and yet require no restrictions and suffer no task loss from the very activities which caused claimant's injury to develop in the first place. The ALJ was also concerned with Dr. Moore's opinion and, rejecting same, adopted Dr. Delgado's determination that claimant had lost the ability to perform nineteen of the thirty-six tasks. The Board, likewise, finds this 52.8 percent task loss to be appropriate and adopts same as its own for the purposes of this award.

⁶ K.S.A. 44-510e.

When applying K.S.A. 44-510e, the Board must also consider the efforts of claimant to find appropriate employment. In considering what, if any, permanent partial general disability claimant would be entitled to, the Board must consider the policies set forth in both *Foulk*⁷ and *Copeland*.⁸ In *Foulk*, the Kansas Court of Appeals determined that a claimant is not entitled to obtain permanent partial general disability under K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) if the claimant refuses work which is offered by the employer at a comparable wage. In this instance, claimant attempted to perform the work offered by respondent and it was only respondent's failure to provide medical care and failure to observe the restrictions placed upon claimant by her earlier treating physician, Dr. Fischer, and her evaluating physician, Dr. Delgado, which led to claimant's termination. The Board does not find that claimant violated the policies set forth in *Foulk*.

However, K.S.A. 44-510e must also be considered in light of the policies set forth in *Copeland*. According to *Copeland*, it must be determined whether a claimant has made a good faith effort to obtain post-injury employment. If the claimant fails to put forth a good faith effort to find employment, post injury, then the fact finder must impute a wage to the claimant based upon all the information contained in the record, including any expert testimony regarding the claimant's ability to earn wages. In this instance, claimant sought employment after leaving respondent's employment and did ultimately obtain employment at several different jobs.

The Board notes that claimant's entitlement to a 12 percent impairment to the body as a whole on a functional basis equates to 49.8 weeks of permanent partial general work disability beginning as of the date of accident of April 2, 2002. This award would be fully paid as of May 23, 2003, the date of claimant's termination of employment which triggered her entitlement to a permanent partial general disability under K.S.A. 44-510e. Claimant testified to her ongoing job search activities after May 23, 2003, which did result in her obtaining employment, even though only part-time, with W. Harris Government Services. For this job, claimant earned \$9,914.74.

The ALJ, in determining what, if any, wage loss claimant suffered, combined all of claimant's wages for the years 2003, 2004 and 2005 (up to her March 5, 2005 layoff from Lesco) into a lump and divided the entire sum by 93.14 weeks, the period from May 23, 2003, to March 5, 2005. The Board has, in the past, considered a claimant's wage for an entire year, especially in a circumstance such as this one, where claimant's work activities and actual earnings varied substantially. Claimant had a multitude of full-time and part-time jobs over the period after her employment with respondent ceased. The

⁷ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁸ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

Board finds that procedure to be more appropriate than the one utilized by the ALJ. Therefore, for the year 2003, the Board finds that after May 23, 2003, claimant earned \$9,914.74, which equates to \$312.67 per week, resulting in a wage loss of 38 percent for the year 2003.

For year 2004, claimant earned a total of \$25,345. This equates to a weekly wage of \$484.70, which is 96 percent of claimant's average weekly wage at the time of injury of \$505.53. Therefore, for the year 2004, pursuant to K.S.A. 44-510e, claimant is limited to her functional impairment, as claimant engaged in work for wages equal to 90 percent or more of the average weekly wage that claimant was earning at the time of the injury.

For the year 2005, claimant put forth a good faith job search effort, having secured employment with Lesco through March 5, 2005, the date of claimant's layoff from that employer. As the Board finds claimant was putting forth a good faith effort to obtain employment, claimant's actual wage will be utilized while employed with Lesco. There is, however, a discrepancy in what wages claimant earned while with Lesco. Claimant testified to earning \$11.48 an hour or \$11.61 an hour with Lesco, working 37.5 hours a week. Claimant also advised Mr. Longacre that she was earning \$12.66 per hour. The Board finds in this instance that a preponderance of the evidence supports a finding that claimant was earning \$11.61 an hour and working 37.5 hours a week for Lesco. This equates to an average weekly wage of \$435.38, resulting in a 14 percent wage loss through March 5, 2005.

Claimant testified that after her layoff from Lesco, Lesco was contractually obligated to call her back. Claimant also testified that the guaranteed callback released claimant from the normal obligation of seeking employment while collecting unemployment benefits of \$284 a week. Claimant, therefore, after March 5, 2005, put forth no effort to obtain employment. While the Board acknowledges that this activity on claimant's part may be justified by the Kansas unemployment laws, it does not justify claimant's lack of effort under the Kansas Workers Compensation Act. *Copeland* requires a claimant put forth a good faith effort to obtain employment. For claimant to sit home and collect unemployment benefits violates claimant's obligation, under the Workers Compensation Act, to put forth a good faith effort to obtain employment.⁹ The Board, therefore, will impute to claimant a wage based upon claimant's ability to earn wages. In this instance, during claimant's post-accident employment, claimant worked for wages ranging from minimum wage to \$9.00 an hour, exclusive of the job with Lesco which Mr. Longacre identified as claimant's highest paying job. It does not appear realistic to expect claimant to find other employment that pays as much as she was earning at Lesco. Her earning capacity in her geographical area and with her restrictions is less than what she was earning at Lesco. In reviewing the

⁹ *Id.*

record, the Board agrees with the ALJ's determination and will impute to claimant a wage, after March 5, 2005, of \$7 per hour based upon a 40-hour week, as there is no evidence in this record to indicate that claimant is limited in her ability to work full-time employment. The Board, therefore, imputes to claimant a post-injury weekly wage of \$280 effective March 6, 2005. This equates to a wage loss of 44.6 percent.

Therefore, for the year 2003, claimant has suffered a wage loss of 38 percent and a task loss of 52.8 percent, for a 45.4 percent permanent partial general disability pursuant to K.S.A. 44-510e. For the year 2004, claimant is limited to her functional impairment. Pursuant to K.S.A. 44-510e, as claimant's functional impairment of 12 percent is fully paid out, claimant would be entitled to no additional disability benefits for the year 2004. For the year 2005, effective through March 5, 2005, the Board finds claimant has suffered a wage loss of 14 percent which, when combined with claimant's task loss of 52.8 percent, results in a permanent partial general disability of 33.4 percent through March 5, 2005. Effective March 6, 2005, claimant has suffered a wage loss (based upon an imputed wage of \$280) of 44.6 percent which, when combined with claimant's task loss of 52.8 percent, results in a permanent partial general disability of 48.7 percent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bryce D. Benedict dated July 27, 2005, should be, and is hereby, modified to award claimant a 12 percent permanent partial disability based upon her whole body functional impairment, followed by a 45.4 percent permanent partial general disability for the year 2003. Claimant will be entitled to no additional benefits for the year 2004. Claimant will then be awarded additional benefits at the rate of \$337.04 beginning January 1, 2005.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Countress Backman, and against the respondent, Armour Swift Eckrich, and its insurance carrier, Conagra Foods Refrigerated Foods Company, Inc., for an accidental injury which occurred April 2, 2002.

Claimant is entitled to 49.8 weeks of permanent partial disability compensation at the rate of \$303.70 per week totaling \$15,124.26 for a 12 percent permanent partial functional disability. For the period May 24, 2003, thru December 31, 2003, claimant is entitled to 31.71 weeks of permanent partial general disability compensation at the rate of \$337.04 per week totaling \$10,687.54 for a 45.4 percent permanent partial general disability. For the period January 1, 2005, thru March 5, 2005, claimant is entitled to 9.14 weeks of permanent partial general disability compensation at the rate of \$337.04

per week totaling \$3,080.55 for a 33.4 percent permanent partial general disability. Commencing March 6, 2005, claimant is entitled to 111.46 weeks of permanent partial general disability compensation at the rate of \$337.04 per week totaling \$37,566.48 for a 48.7 percent permanent partial general disability, making a total award of \$66,548.83.

As of December 21, 2005, there is due and owing claimant 49.8 weeks of permanent partial disability compensation at the rate of \$303.70 per week totaling \$15,124.26, followed by 82.42 weeks of permanent partial general disability compensation at the rate of \$337.04 totaling \$27,778.84, for a total of \$42,903.10, which is ordered paid in one lump sum minus any amounts previously paid. The remaining balance of \$23,555.73 is to be paid for 69.89 weeks at the rate of \$337.04 per week, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of January, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Members respectfully dissent from the opinion of the majority that claimant should be imputed a wage of \$7 per hour after her layoff from Lesco on March 5, 2005. These Board Members acknowledge claimant's activities in not seeking employment, but simply collecting her unemployment, waiting for a recall to Lesco, do not constitute a good faith effort under K.S.A. 44-510e or pursuant to *Copeland*. However, to only impute claimant a wage of \$7 per hour grossly understates claimant's ability to earn wages. Claimant was earning \$9.55 an hour for respondent, with substantial benefits provided during her employment there. After leaving respondent's employment, claimant has clearly displayed an ability to earn wages in excess of a \$7-an-hour imputed wage. Claimant's ability to earn wages was so significant during the year 2004 that she exceeded the 90 percent limitation set forth in K.S.A. 44-510e. Additionally, claimant's job at Lesco paid her \$11.61 an hour, which results in a wage loss of only 14 percent. To award

claimant's lack of effort by imputing such a low wage violates the policy set forth in *Copeland*.

These Board Members would impute to claimant \$11.61 per hour, such as she was earning for Lesco after the March 5, 2005 layoff. This would result in a wage loss of 14 percent to claimant, which, when combined with claimant's task loss of 52.8 percent, would result in a permanent partial disability of 33.4 percent, the same as suffered by claimant for the period January 1, 2005, through March 5, 2005, the time of her Lesco layoff. The majority's opinion above in effect rewards claimant by imputing a wage which is \$4 less per week than the unemployment benefits claimant is receiving for sitting home and making absolutely no attempt to find other employment. These Board Members do not find claimant's activities to constitute a good faith effort and, pursuant to *Copeland*, would impute the wage claimant clearly showed the ability to earn while employed with Lesco.

BOARD MEMBER

BOARD MEMBER

c: Jeffrey K. Cooper, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director